WP(C) 9511/2004
BEFORE
THE HON'BLE MR JUSTICE RANJAN GOGOI

1. Heard Mr. H.R.A.Choudhury, learned Sr. Counsel for the petitioner and Mr. M.R.Pathak, learned Departmental Counsel. None has appeared on behalf of the Respondent Nos. 3,4 and 5 inspite of due service of notice. However, the affidavits filed by the Respondent Nos. 3,4 and 5 have been duly considered.

2. The brief facts may be noticed at the outset.

The Gargaon College is a Govt. aided College. The petitioner joined in the said College as a Lecturer in Assamese on 23.4.91 on the basis of an appointment order which had the approval of the Director of Higher Education. On 5.11.94, the petitioner was confirmed in service. With effect from 19.1.98 the petitioner was allowed to draw senior scale of pay by an order-dated 17.11.99. On the other hand, the Respondent No. 5 ,who was earlier working in the Sonari College, joined the Gargaon College as a Lecturer in the Assamese Department on 7.11.94. With effect from 31.3.04 the Head of the Assamese Department of Gargaon College having joined as the Principal of the College, the post of Head of the Department, Assamese, became vacant. The Respondent No.5 was allowed to hold charge of the said post of Head of the Department. Thereafter, the Governing Body of the College took a resolution on 26.6.04 for appointment of the said Respondent as the Head of the Department. According to the petitioner, there is a Govt. notification dated 16.5.68 which contemplates that persons earlier working in one aided College upon his joining in the new College, will get pay protection but not seniority on the basis of the service rendered in the earlier College. The petitioner, therefore, being aggrieved by the resolution of the Governing body dated 26.6.2004 submitted a representation to the Director of Higher Education. It is the case of the petitioner that even the Governing Body of the College by letter dated 8.6.2004 had requested the Director to apprise the Governing Body as to who between the petitioner and the Respondent No.5 would be senior. The said letter of the Governing Body was replied by the Director on 30.7.04 by mentioning that a Lecturer coming from another College cannot claim seniority over the existing staff of the College in which such person may have joined. However, even before the receipt of the aforesaid order/communication dated 30.7.04 of the Director, the Governing Body of the College had already passed the resolution on 26.6.2004. Accordingly, on the basis of the petitioner's representation dated 2.7.2004,the Director by an order dated 8.11.2004 refused to accord approval to the Resolution dated 26.6.2004. However, subsequently by another order dated 6.12.2004, the earlier order of the Director dated 8.11.2004 was cancelled. Aggrieved, this writ petition has been filed.

3. Shri H.R.A.Choudhury, learned counsel for the petitioner has submitted that in terms of the Govt. notification dated 16.5.68 (Annexure 4 to the writ petition) and the Director's communication dated 30.7.04 (Annexure-6 to the writ petition) , it is crystal clear that the Respondent No.5 cannot have the benefit of the service rendered by her in the Sonari College for the purpose of determination of her seniority amongst the existing teaching staff of the Gargaon College. This is why the Director by his order-dated 8.11.2004 had refused to approve the resolution of the Governing Body dated 26.6.2004 by which the Respondent No.5 was appointed as Head of the Department. Shri Choudhury has further argued that notwithstanding the clear stipulation contained in the Govt. notification dated 16.5.68; in the communication of the Director dated 30.7.2004 as well as in the Director's letter dated 8.11.04 a contrary stand has been taken in the impugned order dated 6.12.2004. The same is neither supported by any reasons or justification nor it is in conformity with the laid down norms. Shri Choudhury has ,therefore, submitted that the impugned order dated 6.12.2004 passed by the Director has no legs to stand and that the said order should be interfered with by this Court and the petitioner should be declared senior to the Respondent No.5.

4. The Respondent Nos. 3 ,4 and 5 not being represented , the Court has thought it proper to look into the stand of the said Respondents as projected in the affidavits filed . In the affidavits filed by the Respondent Nos. 3 and 4, the stand taken is that the Respondent No.5 had not been appointed as Head of the Department by virtue of her seniority alone but also on account of her merit. However, in the affidavit filed by the Respondent No.5, the aforesaid stand has not been supported inasmuch as the Respondent No.5 claims to be the senior most Lecturer in the Department of Assamese entitling her to be appointed as Head of the Department.

5. Mr.M.R.Pathak, learned Departmental Counsel has produced the records of the case and, on instructions received, has submitted that insofar as aided Colleges are concerned , seniority of the incumbents working in such Colleges are to be counted from the date of their joining . Mr. Pathak has further submitted that insofar as aided Colleges are concerned , the posts are not inter se transferable and a person joining in one College after serving in another college, does so on the basis of a fresh appointment order and not a transfer order. Mr. Pathak has also placed before the Court the record in original which on due perusal reveals that the subsequent stand of the Director reflected in the order dated 6.12.04 has been prompted by certain extraneous consideration i.e. note /request of a Minister.

6. Under the Rules in force i.e. Assam Non Government College Management Rules, 2001, the appointing authority in Govt. aided colleges is the Governing Body of the respective Colleges. Incumbents working in different Govt. aided Colleges are not governed by any condition of service which make them transferable from one college to another. The appointment of a person in any particular aided College, after such person had served in another aided College, therefore, will not be by way of transfer but has to be understood to be a fresh appointment made by the appointing authority of that particular College. The Govt. notification dated 16.5.68 makes it clear that an incumbent who was earlier working in one aided College and who has joined, later, in any other College may be entitled to pay protection but such a person will not get seniority on the basis of the service earlier rendered. Understanding the Government notification dated 16.5.68 in the above manner, the Director, in response to the request of the Governing Body for necessary clarification as to the inter se seniority of the petitioner and the Respondent No.5, had issued the letter dated 30.7.2004 to the above effect. However, before the said letter had reached the Governing Body, it had already taken the resolution dated 26.6.2004. In such circumstances, the Director thought it fit to pass the order dated 8.11.2004 refusing to approve the Resolution dated 26.6.2004. The stand taken by the Director in his order dated 8.11.2004 appears to be just and in conformity with the norms spelt out by the Govt. notification dated 16.5.68. However, in departure to the said laid down norms, the Director had taken a reverse stand by passing the impugned order dated 6.12.2004. No reason has been assigned in the said order for the stand taken. Neither any such reason, capable of acceptance in law, has been laid before the Court. In such circumstances, without going in to the question as to the extraneous considerations that may have prompted the aforesaid decision as the records would seem to indicate , the Court is able to hold the order dated 6.12.2004 of the Director to be legally untenable.

7. The Governing Body of the College , it has been noticed, has taken a stand in the affidavit filed that its resolution dated 26.6.2004 has been prompted by considerations of the merit of the Respondent No.5 The contention advanced is wholly unacceptable. How merit has been judged, if at all, has not been disclosed either in the Resolution adopted or in the affidavit filed. How the petitioner has been found to be less meritorious than the Respondent No.5 is also not disclosed. In such circumstances, the Court has to hold that the plea advanced with regard to better merit of the Respondent No.5 is an after thought, which cannot have the acceptance of the Court.

8. In view of the discussions that have preceded and for the reasons allude d, I am of the view that this writ petition should be allowed. It is accordingly allowed. The resolution of the Governing Body dated 26.6.2004 and the order of the Director dated 6.12.2004 are herby set aside with the declaration that in te rms of seniority the petitioner is entitled to be placed higher than the Respon dent No.5.

The writ petition, consequently, is allowed as indicated above.